(2)

Supreme Court, U.S.
FILED
JUL 1 - 2005
OFFICE OF THE CLERK

No. 04-1452

IN THE

Supreme Court of the United States

LOCAL 464A UFCW WELFARE REIMBURSEMENT PLAN,

Petitioner,

v.

PASCACK VALLEY HOSPITAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

KEITH R. MCMURDY
Counsel of Record
KEITH J. ROSENBLATT
GROTTA, GLASSMAN & HOFFMAN, P.C.
75 Livingston Avenue
Roseland, New Jersey 07068
(973) 992-4800

Attorneys for Respondent

195215

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED BY THE PETITION

Do the federal courts have removal jurisdiction over a state-court lawsuit governed by federal common law, where the complaint does not identify the source of the common law right?

The Question Presented by the Petition is not at issue in this case because the claims asserted in the state court action are not governed by federal common law.

CORPORATE DISCLOSURE STATEMENT

Respondent Pascack Valley Hospital, Inc., a non-governmental corporate party, does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED BY THE PETITION ... i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

I. THE THIRD CIRCUIT'S DECISION IS NOT CONTRARY TO SUPREME COURT PRECEDENT REGARDING REMOVAL JURISDICTION 3

A. The Third Circuit Correctly Applied This Court's Well-Settled Jurisprudence Regarding The Well-Pleaded Complaint Rule 4

B. The Third Circuit Correctly Applied This Court's Decisions Regarding The Doctrine Of Complete Preemption 11

II. THE THIRD CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS 14

CONCLUSION 17

TABLE OF CITED AUTHORITIES

CASES *Page*

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004) 3, 4, 12, 13

Airco Industrial Gases, Inc. v. Teamsters Health & Welfare Pension Fund,
850 F.2d 1028 (3d Cir. 1988) 9, 10

Battle v. Seibels Bruce Insurance Co.,
288 F.3d 596 (4th Cir. 2002) 14

Bauhaus USA, Inc. v. Copeland,
292 F.3d 439 (5th Cir. 2002) 7

Baylor Univ. Med. Ctr. v. Arkansas Blue Cross Blue Shield,
331 F.Supp.2d 502 (N.D. Tex. 2004) 16

Beneficial National Bank v. Anderson,
539 U.S. 1 (2003) 4, 5, 12

Blue Cross v. Anesthesia Care Associates Medical Group, Inc.,
187 F.3d 1045 (9th Cir. 1999) 15, 16

Bollman Hat Co. v. Root,
112 F.3d 113 (3d Cir.), *cert. denied*,
522 U.S. 952 (1997) 9, 10

Cited Authorities

Page

California ex rel. Lockyer v. Dynegy, Inc.,
375 F.3d 831 (9th Cir. 2003), *cert. denied*,
125 S. Ct. 1836 (2005) 14

Caterpillar Inc. v. Williams,
482 U.S. 386 (1987). 4, 5, 12

Children's Hosp. Corp. v. Kindercare Learning Ctrs., Inc.,
360 F.Supp.2d 202 (D. Mass. 2005) 16

City of Chicago v. International College of Surgeons,
522 U.S. 156 (1997) 10

Community Health Plan v. Mosser,
347 F.3d 619 (6th Cir. 2003) 6

D'Alessio v. New York Stock Exch., Inc.,
258 F.3d 93 (2d Cir.), *cert. denied*,
534 U.S. 1066 (2001) 15

Dallas County Hosp. Dist. v. Associates' Health & Welfare Plan,
293 F.3d 292 (5th Cir. 2002) 13

Empire Kosher Poultry, Inc. v. UFCW Health & Welfare Fund,
285 F.Supp.2d 573 (M.D. Pa. 2003). 8

The Fair v. Kohler Die & Specialty Co.,
228 U.S. 22 (1913) 5

Cited Authorities

Page

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 9

Franchise Tax Board v. Construction Laborers Vacation Trust,
463 U.S. 1 (1983) .....*passim*

Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.,
125 S. Ct. 2363, 2005 WL 1383604 (2005) 10, 11

Great Northern Ry. Co. v. Alexander,
246 U.S. 276 (1918) 5

Great-West Life & Annuity Insurance Company v. Knudson,
534 U.S. 204 (2002) .....*passim*

Gully v. First Nat'l Bank,
299 U.S. 109 (1936) 5

Hill v. Bellsouth Telecomm., Inc.,
364 F.3d 1308 (11th Cir. 2004) 14

Hospice of Metro Denver, Inc. v. Group Health Ins. of Oklahoma, Inc.,
944 F.2d 752 (10th Cir. 1991) 16

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 6

Cited Authorities

Page

In Home Health, Inc. v. The Prudential Ins. Co.,
101 F.3d 600 (8th Cir. 1997) 16

Johns Hopkins Hospital v. Carefirst of Maryland, Inc.,
327 F.Supp.2d 577 (D. Md. 2004) 16

Louisville & Nashville R.R. Co. v. Mottley,
211 U.S. 152 (1908) 4

Mackey v. Lanier Collection Agency & Serv., Inc.,
486 U.S. 825 (1988) 9

Marcus v. AT&T Corp.,
138 F.3d 46 (2d Cir. 1998) 14

Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 8

McGurl v. Trucking Employees of North Jersey Welfare Fund, Inc.,
124 F.3d 471 (3d Cir. 1997) 9

Merrell Dow Pharmaceuticals, Inc. v. Thompson,
478 U.S. 804 (1986) 5

Mertens v. Hewitt Assocs.,
508 U.S. 259 (1993) 6, 7

Metropolitan Life Ins. Co. v. Taylor,
481 U.S. 58 (1987) 4, 12

Cited Authorities

Page

Northeast Dep't ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147 (3d Cir. 1985) 9, 10

Orthopaedic Surgery Assocs. of San Antonio, P.A. v. Prudential Health Care Plan, Inc., 147 F.Supp.2d 595 (W.D. Tex. 2001). 16

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 9

Pinney v. Nokia, Inc., 402 F.3d 430 (4th Cir. 2005) 5

Plucinski v. IAM Nat'l Pension Fund, 875 F.2d 1052 (3d Cir. 1989) 8, 9

Qualchoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 1639 (2005). 7

Schlesinger v. Councilman, 420 U.S. 738 (1975) 10

Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, 159 F.3d 1209 (9th Cir. 1998) 15

Cited Authorities

Page

Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Wells, 213 F.3d 398 (7th Cir. 2000) 8

Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998) 10

STATUTES

29 U.S.C. § 1001 (West 2005) 9

29 U.S.C. § 1132(a) (West 2005) 7, 12, 13

Pascack Valley Hospital, Inc., as respondent, respectfully requests that this Court deny the petition seeking review of the judgment of the Third Circuit Court of Appeals.

STATEMENT OF THE CASE

The Petitioner, Local 464A UFCW Welfare Reimbursement Plan ("the Plan"), is an employee welfare benefit plan regulated by ERISA. (Pet. App. 6a). The Respondent, Pascack Valley Hospital, Inc. ("the Hospital"), is a medical service provider. (Pet. App. 28a). The Hospital brought an action against the Plan in state court to pursue contractual remedies and the Plan removed the case to federal court. (Pet. App. 5a).

The relationship between the Plan and the Hospital is purely contractual, and arises solely from both parties' relationship with MagNet, an independent organizer of a network of hospitals that have agreed to accept discounted payments for medical services provided to group health plan beneficiaries in return for the plans' promise to encourage beneficiaries to use those hospitals. (Pet. App. 6a, 28a-29a). The network hospitals (one of whom is Respondent) do not contract directly with the plans. (Pet. App. 6a). Instead, MagNet enters into separate contracts with individual plans, called Subscriber Agreements, and separate contracts with individual hospitals. (Pet. App. 6a-7a).

In 1999, the Hospital provided medical services to Betty Psaras and Kimberly Rovetto, two of the Plan's participants. (Pet. App. 7a, 29a-30a). The Plan submitted payment for these services to the Hospital at a discounted rate, but not until after the 30-day discount rate period established by the Subscriber Agreement had expired. (Pet. App. 7a-8a,

29a-30a). As a result, the Plan was contractually obligated to pay the Hospital the full amount for its services, rather than the discounted amount. (Pet. App. 7a-8a, 29a-30a). The Plan refused to make this additional payment (the difference between the discounted amount paid and the full amount owed). (Pet. App. 29a-30a).

On October 23, 2002, the Hospital filed suit against the Plan in the Superior Court of New Jersey, alleging only contract-based claims under state law to recover the unpaid amounts due. (Pet. App. 8a, 27a-31a). The Hospital's Complaint alleged that the Plan breached its contractual obligations to the Hospital, an intended third-party beneficiary of the Subscriber Agreement, by improperly taking a discount on the services provided without first satisfying the condition precedent of making payment within thirty days. (Pet. App. 8a, 28a-30a). The Plan removed the case to the United States District Court for the District of New Jersey, contending that the Complaint was completely preempted by ERISA. (Pet. App. 8a-9a).

On September 26, 2003, the district court denied the Hospital's motion to remand and granted summary judgment to the Plan on the grounds of complete preemption, dismissing the Complaint without prejudice. (Pet. App. 24a-26a). The Hospital filed a timely notice of appeal to the Third Circuit Court of Appeals. (Pet. App. 9a-10a).

Oral argument was heard by the Court of Appeals on June 16, 2004. On November 1, 2004, the Court of Appeals determined that: (1) under the well-pleaded complaint rule, the Hospital's Complaint did not present a federal question that would support removal, and (2) the Hospital's state law breach of contract claims were not completely preempted by

ERISA's civil enforcement provision because the Hospital could not have brought its claims under ERISA. (Pet. App. 6a). Accordingly, the Third Circuit vacated the district court's judgment and ordered the case remanded to state court for lack of federal subject matter jurisdiction.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT'S DECISION IS NOT CONTRARY TO SUPREME COURT PRECEDENT REGARDING REMOVAL JURISDICTION

The Third Circuit did not depart from this Court's precedents in deciding this case. To the contrary, the Third Circuit properly applied the Court's well-pleaded complaint rule and doctrine of complete preemption in determining that the Hospital's Complaint presented no federal question to support removal jurisdiction. Thus, there is no need for the Court to revisit this settled area of removal jurisprudence.

This Court has recently reaffirmed that the well-pleaded complaint rule is the proper tool for determining whether a case has been properly removed to federal court under 28 U.S.C. §§ 1331 and 1441. *See Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2494 (2004) (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983)). In *Davila*, the Court also articulated the proper test for determining whether a state law claim "arises under" ERISA and is therefore completely preempted despite the manner in which a plaintiff pleads its claims. *See id.* at 2496. The Third Circuit's decision fully comports with *Davila* and other decisions of this Court.

This Court has also held that the type of the relief that the Hospital seeks – purely legal relief as defined by *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002) – is not authorized by ERISA and therefore cannot be rooted in the "federal common law" of ERISA. Therefore, as a matter of law, the Third Circuit was correct in remanding this case to state court.

A. The Third Circuit Correctly Applied This Court's Well-Settled Jurisprudence Regarding The Well-Pleaded Complaint Rule

Contrary to the Plan's assertion, there is nothing "unsettled" about "the state of 'arising under' jurisdiction" regarding removal. As this Court recently reaffirmed, determining whether a claim "arises under" federal law for purposes of removal jurisdiction under 28 U.S.C. § 1441(b) "turns on the 'well-pleaded complaint' rule." *Davila*, 124 S. Ct. at 2494 (quoting *Franchise Tax*, 463 U.S. at 9-10). Under this rule, courts are to examine "the 'well pleaded' allegations of the complaint and ignore potential defenses [including the pre-emptive effect of a federal statute]," because "'a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.'" *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (quoting *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). Pursuant to this "century-old jurisdictional framework governing removal of federal question cases," the plaintiff remains the "master of [its] claim," and may "avoid federal jurisdiction by exclusive reliance on state law" in drafting the complaint, even where (unlike here) a federal claim is also available. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 395 (1987).

Indeed, this Court has repeatedly held that under the well-pleaded complaint rule, the plaintiff's choice of a state court forum should not be disturbed if he chooses to proceed solely under state law. *Id.* at 392, 399; *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced"); *Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918) ("the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case"); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under' the . . . law of the United States"). In fact, the Plan acknowledges as much in the Petition. (Pet. at 7). Accordingly, a case generally will not be removable if the complaint does not "affirmatively allege" a federal claim or if federal law is not an "essential element" of the plaintiff's cause of action. *Beneficial Nat'l Bank*, 539 U.S. at 6; *Franchise Tax*, 463 U.S. at 11 (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936)). *See also Pinney v. Nokia, Inc.*, 402 F.3d 430, 442 (4th Cir. 2005) ("[i]f a plaintiff can establish, without the resolution of an issue of federal law, all of the essential elements of his state law claim, then the claim does not necessarily depend on a question of federal law" and removal is improper) (citing *Franchise Tax*, 463 U.S. at 13-14).

The Third Circuit applied this rule to determine that the Hospital's Complaint for breach of contract, which alleges no federal claims on its face, does not depend upon federal law. This is because, as the Third Circuit properly held, neither the rights or immunities created under ERISA (which the Hospital lacks standing to invoke), nor the federal

common law of ERISA, provides *any* element, much less an essential element, of the Hospital's claims. (Pet. App. 11a, 12a, 14a-15a). Thus, the Hospital's claims for the Plan's breach of the Subscriber Agreement must be premised exclusively upon New Jersey common law. (Pet. App. 11a-12a, 18a-22a). The Plan's disagreement with this conclusion does not warrant a grant of certiorari.

Nevertheless, the Plan insists that the Hospital's claims are necessarily based on the federal common law of ERISA, and that therefore, the Third Circuit's conclusion to the contrary must be reviewed. However, this Court has previously instructed that "[t]he authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (warning that ERISA "should not be supplemented by extratextual remedies" such as those formed by common law, which "must give way [when] inconsistent with 'the language of the statute, its structure, or its purposes'") (citations omitted). Thus, any federal common law of ERISA must be premised upon an express provision of ERISA. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (citations omitted) (reaffirming that Congress did not authorize the courts to create remedies that ERISA does not expressly incorporate or specifically authorize) (citations omitted); *Community Health Plan v. Mosser*, 347 F.3d 619, 624 (6th Cir. 2003) (holding that after *Knudson*, "federal question jurisdiction does not exist under 28 U.S.C. § 1331 if ERISA does not authorize the suit").

Since there is no provision of ERISA under which the Hospital's claims may arise, those claims may not arise under

ERISA's federal common law. *Knudson*, 534 U.S. at 209, 218, 220-21; *Mertens*, 508 U.S. at 259. First, under the terms of the statute, only the Secretary of Labor and plan participants, beneficiaries or fiduciaries are empowered to bring suit under ERISA. 29 U.S.C. § 1132(a) (West 2005). Claims by other entities, such as the Hospital, cannot "arise under" ERISA or its common law and therefore cannot be filed in federal court. *See Franchise Tax*, 463 U.S. at 27 (since ERISA "carefully enumerates" the parties entitled to file civil actions, a suit for relief by some other party does not "arise under" its provisions); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 442 n.6 (5th Cir. 2002) (where ERISA does not authorize the suit, "there is no independent ground for federal question jurisdiction under § 1331").

Second, ERISA does not authorize the type of strictly legal relief that the Hospital seeks. *Knudson*, 534 U.S. at 221. In *Knudson*, this Court explained that ERISA does not authorize actions for money damages, regardless of whether they are couched in terms of an equitable remedy such as restitution or unjust enrichment. *Id.* at 209-15, 221. Instead, whether the remedy sought is legal or equitable depends upon the basis for the plaintiff's claim and the nature of the underlying remedy. *Id.* at 213. Thus, the Court explained, a plaintiff seeking to impose personal liability "for a contractual obligation to pay money – relief that was not typically available in equity," is seeking money damages, "'the classic form of *legal* relief.'" *Id.* at 210 (quoting *Mertens*, 508 U.S. at 255) (emphasis in original). As a matter of law, such claims cannot arise under ERISA. *Id.* at 218, 221. Therefore, there can be no federal subject matter jurisdiction over them. *Qualchoice, Inc. v. Rowland*, 367 F.3d 638, 642 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 1639 (2005). Indeed, Justice Ginsberg expressly recognized this to be the

case in *Knudson*: "[a]fter today, [parties] unable to fit their suits within the confines the Court's opinion constructs *are barred from a federal forum*" and may seek relief only in state court. *Knudson*, 534 U.S. at 227 (Ginsberg, J., dissenting) (emphasis added).

The Hospital's Complaint asserts only one type of claim for relief: money due and owing under a contract. Thus, the Hospital's suit is "'quintessentially an action at law,'" *id.* at 210 (quoting *Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Wells*, 213 F.3d 398, 401 (7th Cir. 2000)), and cannot arise under ERISA or its federal common law. *Id.* at 218, 221; *Franchise Tax*, 463 U.S. at 27.[1]

Additionally, the federal common law sanctioned by Congress under ERISA was never intended to apply to

---

[1] The Plan attempts to dismiss the fatal effect of *Knudson* on its federal jurisdiction claims by a lone citation to a district court case, *Empire Kosher Poultry, Inc. v. UFCW Health & Welfare Fund*, 285 F. Supp.2d 573 (M.D. Pa. 2003). In *Empire*, the district court erroneously concluded that *Knudson* did not abolish extratextual federal common law remedies because *Knudson* cited to the 1985 case of *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), in instructing courts not to "tamper with ERISA's enforcement scheme . . . by extending remedies not specifically authorized by its text." The *Empire* court reasoned that the Third Circuit must have been aware of *Russell* when it created a federal common law remedy in *Plucinski v. IAM Nat'l Pension Fund*, 875 F.2d 1052 (3d Cir. 1989), and that therefore, *Knudson*'s reaffirmation of *Russell* in 2002 could have no effect on Third Circuit precedent under *Plucinski*. *Empire*, *supra* at 581 n.9. This analysis by the district court cannot nullify *Knudson*'s clarification of the availability of federal common law ERISA remedies. Further, unlike here, the plaintiff in *Empire* expressly invoked federal jurisdiction in its complaint, thereby giving the court subject matter jurisdiction to consider the claim.

ordinary contract disputes between a welfare plan and a non-ERISA entity such as the Hospital. *Bollman Hat Co. v. Root*, 112 F.3d 113, 115 (3d Cir.), *cert. denied*, 522 U.S. 952 (1997) ("[a] case arises under federal common law if the issue presented is one 'of central concern' to ERISA"). Rather, Congress authorized the development of such common law only to deal with issues involving the rights and obligations of participants, beneficiaries and fiduciaries under private welfare and pension plans. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 113 (1989); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); 29 U.S.C. § 1001 (West 2005) (declaring Congressional purpose of ERISA to be the protection of plan participants and beneficiaries and the establishment of plan fiduciary responsibilities).

This is demonstrated by the Third Circuit cases relied upon by the Plan, which all pre-date *Knudson* and involve either: (1) an interpretation of plan terms regarding coverage for beneficiaries or participants, or (2) equitable unjust enrichment or restitution claims in the form of a plan's retention of overpaid fund contributions or its subrogation rights against a participant or beneficiary.[2] These cases do not apply to the Hospital's claims, which seek payment of a contractual obligation to pay for services rendered by a third party. (Pet. App. 8a, 28a-30a). *See also Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 833 (1988) (instructing that "run-of-the-mill" state-law tort and breach

---

[2] *See Bollman Hat Co.*, 112 F.3d at 114-15, 116-17; *Airco Indus. Gases, Inc. v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028, 1030-31 (3d Cir. 1988); *Northeast Dep't ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 150 (3d Cir. 1985); *McGurl v. Trucking Employees of North Jersey Welfare Fund, Inc.*, 124 F.3d 471, 473 (3d Cir. 1997); *Plucinski v. IAM Nat'l Pension Fund*, 875 F.2d 1052, 1053 (3d Cir. 1989).

of contract suits against ERISA plans, regardless of whether such suits will affect or result in money judgments against plan assets, are not pre-empted by ERISA).

These cases also do not support the Plan's claim for removal jurisdiction because, unlike the Hospital, the plaintiffs therein invoked federal law, subjecting them to federal jurisdiction under the well-pleaded complaint rule. *See, e.g., Bollman*, 112 F.3d at 115; *Airco*, 850 F.2d at 1031; *ILGWU*, 764 F.2d at 150; (Pet. App. 12a). The Plan's reliance on *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998) and *Schlesinger v. Councilman*, 420 U.S. 738 (1975), fails for this reason as well.

In *City of Chicago*, the plaintiff alleged violations of federal law (the Fifth and Fourteenth Amendments) on the face of its complaint. *City of Chicago*, 522 U.S. at 160. Likewise, in *Schacht*, the plaintiff's complaint alleged violations of the Fourteenth Amendment and 42 U.S.C. § 1983, while *Schlesinger* involved a jurisdictionally uncontested constitutional conflict between the "military justice system established by Congress and the powers and responsibilities of Article III courts." *Schacht*, 524 U.S. at 383-84; *Schlesinger*, 420 U.S. at 740. Thus, unlike this case, federal question jurisdiction was proper in those cases because the federal claims were either specifically plead by the plaintiff or were apparent on the face of the complaint. *City of Chicago*, *supra* at 163-64; *Schacht*, *supra* at 383-84; *Schlesinger*, *supra* at 740, 744-45 & n.9.[3]

---

[3] The Plan has notified the Hospital that it also intends to rely upon this Court's recent decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 125 S.Ct. 2363, 2005 (Cont'd)

B. The Third Circuit Correctly Applied This Court's Decisions Regarding The Doctrine Of Complete Preemption

The Plan contends that the logical extension of the Third Circuit's construction of the well-pleaded complaint rule is that removal will be "impossible whenever the plaintiff does not expressly acknowledge the federal nature of its claim." (Pet. at 7). However, this "logical conclusion" ignores the fact that the Third Circuit looked beyond the express allegations of the Complaint to determine if federal common law provided an essential element of the Hospital's claims under the rule. (Pet. App. 11a-12a). Such a conclusion also ignores Supreme Court precedent regarding the doctrine of complete preemption, which the Third Circuit also properly applied. (Pet. App. 13a-22a).

(Cont'd)
WL 1383604 (2005) in support of its Petition. However, in *Grable*, the Court decided that federal subject matter jurisdiction existed because of the "dispositive and contested federal issue at the heart of [the plaintiff's] state-law title claim" (raised by the face of the complaint): whether the Internal Revenue Service had given plaintiff proper notice of seizure under 26 U.S.C. § 6335. *Id.* at *5, 7. Thus, the issue of whether the plaintiff had been given notice within the meaning of the federal statute was "an *essential element* of its quiet title claim." *Id.* at 5 (emphasis added). Consequently, *Grable* is consistent with this Court's well-pleaded complaint jurisprudence, and *supports* the Third Circuit's analysis. *See Franchise Tax*, 463 U.S. at 10-11 (to support removal, federal law "must be an element, *and an essential one*, of the plaintiff's cause of action") (emphasis added); (Pet. App. 12a) (the federal common law of ERISA *does not provide an element – essential or otherwise* – of [the Hospital's] claim) (emphasis added).

Complete preemption is an exception to the well-pleaded complaint rule, which states that if a federal statute "'wholly displaces the state-law cause of action through complete pre-emption,' the state-law claim can be removed." *Davila*, 124 S. Ct. at 2494-95 (quoting *Beneficial Nat'l Bank*, 539 U.S. at 8). This is because any state law claim that comes within the scope of a completely preemptive federal statute, "even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank*, *supra* at 8. ERISA's civil enforcement provision, § 502(a), codified at 29 U.S.C. § 1132(a), is such a statute. *Davila*, *supra* at 2495-96. Thus, *Davila* answers the Question Presented by the Plan: if a state-court lawsuit is governed by federal common law, complete preemption will support removal regardless of whether the complaint identifies the source of the federal common law right. *Id.* at 2494-95; *see also Metropolitan Life*, 481 U.S. at 66-67 (holding that although plaintiff's suit purported to raise only state law claims, it was completely preempted by § 502 and was therefore removable under 28 U.S.C. §§ 1331 and 1441(b)).[4] Last year, this Court revisited this question in the context of ERISA claims.

In *Davila*, this Court provided the two-pronged test for determining whether a state law based complaint that does not refer to federal law may be removed under ERISA. The

---

[4] Only complete preemption under §502(a) is a basis for removal. *Metropolitan Life*, 481 U.S. at 62-66. Conflict preemption under §514 is a defense which cannot overcome the plaintiff's choice of law and forum under the well-pleaded complaint rule. *Id.* at 64 (citing *Franchise Tax*, 463 U.S. at 25-27); *Caterpillar Inc.*, 482 U.S. at 393 ("it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of preemption") (emphasis in original) (citing *Franchise Tax*, 463 U.S. at 12).

Court analyzed removal under § 1132(a)(1)(B), which is the precise statutory provision under which the Plan claims complete preemption. *Davila*, 124 S. Ct. at 2496; (Pet. App. 14a & 14a n.5). Under *Davila*, such a complaint is completely preempted and is therefore removable if: (1) the plaintiff could have brought its claim under § 502(a), *and* (2) no other independent legal duty implicating the defendant's actions supports the plaintiff's claim. *Davila*, *supra* at 2496.

The Third Circuit carefully analyzed the Plan's contentions under this test. (Pet. App. 13a-22a). As to the first prong, the court properly concluded that the Hospital was not one of the parties entitled to bring suit under § 502(a). Therefore, it had no standing to bring an ERISA claim in federal court. (Pet. App. 14a-18a (citing *Franchise Tax*, 463 U.S. at 27)); *see also Dallas County Hosp. Dist. v. Associates' Health & Welfare Plan*, 293 F.3d 292, 285 (5th Cir. 2002) (absent a valid assignment allowing classification as a participant or beneficiary, "a health care provider has no independent right of standing to seek redress under ERISA").[5] Indeed, as set forth above, *Franchise Tax, Mertens*, and *Knudson* made this clear before *Davila* was decided. As to the second prong, the court correctly determined that the Hospital's claims are predicated not on the Plan, but on the independent legal duty created by the third-party contract (the Subscriber Agreement) executed by the Plan. (Pet. App. 18a-21a). As a result, the Hospital's claims are not completely preempted under ERISA and could not have been brought in federal court. (Pet. App. 18a-21a).

---

[5] The Plan presented no evidence that the Hospital obtained an assignment of rights from Psaras or Rovetto. (Pet. App. 16a-18a).

II. THE THIRD CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS

The Plan incorrectly asserts that certiorari is warranted because the Third Circuit's decision conflicts with the decisions of other Courts of Appeal concerning the well-pleaded complaint rule. Contrary to this assertion, the Third Circuit applied this rule no differently than its sister Circuits.

In the Fourth, Second, Ninth and Eleventh Circuit decisions cited by the Plan, the court applied the well-pleaded complaint rule to determine whether the plaintiff's state law claims involved inexplicitly plead or unplead essential elements of federal law that would support federal jurisdiction (i.e., whether the claims "necessarily depended" on federal law). *See Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 606-08 (4th Cir. 2002) (federal jurisdiction based on fact that only federal common and regulatory law governed interpretation of insurance policies sued upon, which were issued under National Flood Insurance Program); *Marcus v. AT&T Corp.*, 138 F.3d 46, 52-56 (2d Cir. 1998) (federal jurisdiction based on fact that both the parties' legal relationship and the plaintiff's cause of action were premised exclusively upon federal tariffs, which "conclusively and exclusively" determined the parties' rights and liabilities); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838-41 & n.6 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 1836 (2005) (removal proper because the state lawsuit "turn[ed], entirely, on defendant's compliance with a federal regulation"; plaintiff's complaint repeatedly cited to federal tariff allegedly violated by defendant); *Hill v. Bellsouth Telecomm., Inc.*, 364 F.3d 1308, 1314-17 (11th Cir. 2004) (removal jurisdiction based on substantial question of federal law

raised by plaintiff's attack on reasonableness of FCC-approved tariffs); *D'Alessio v. New York Stock Exch., Inc.*, 258 F.3d 93, 101-03 (2d Cir.), *cert. denied*, 534 U.S. 1066 (2001) (federal jurisdiction existed because complaint allegations established that "central premise" of suit was alleged violations of federal securities laws); *Sparta Surgical Corp. v. National Ass'n of Sec. Dealers*, 159 F.3d 1209, 1211-12 (9th Cir. 1998) (removal justified because complaint alleged violations of federal security exchange rules, thereby conferring exclusive jurisdiction on federal courts under Security Exchange Act of 1934).

The Third Circuit applied the same analysis to the Hospital's claims. (Pet. App.11a-12a.) The fact that the Third Circuit did not find that federal statutory or common law were essential elements of the Hospital's claims does not create a conflict with these decisions, particularly since none of them involved alleged ERISA related-claims and the jurisdictional issues they present under § 502(a). In fact, the federal courts which have faced the precise issue presented by this case have determined, as the Third Circuit did, that federal question jurisdiction did not exist.

For example, in *Blue Cross v. Anesthesia Care Associates Medical Group, Inc.*, 187 F.3d 1045 (9th Cir. 1999), the Ninth Circuit Court of Appeals was presented with claims by medical providers against a health care plan for breach of contract. The case involved alleged breaches of Blue Cross' "provider agreements" with the doctors. Under the agreements, Blue Cross had agreed to direct plan subscribers to the doctors for medical care and to pay the doctors according to specified fee schedules. *Id.* at 1048. When Blue Cross attempted to change the fee schedules, the doctors filed

a class action lawsuit in state court for breach of the agreements, which Blue Cross then removed to federal court. *Id.* at 1049.

In rejecting Blue Cross' claims of removal jurisdiction based upon ERISA preemption, the Ninth Circuit held that because the doctors' claims were premised solely upon the terms of the provider agreement, rather than the plan, there was no federal question jurisdiction under ERISA. *Id.* at 1050-52. This is the same result reached by the Third Circuit. (Pet. App. 13a-22a). *See also Hospice of Metro Denver, Inc. v. Group Health Ins. of Oklahoma, Inc.*, 944 F.2d 752, 754-56 (10th Cir. 1991) (holding that health care provider's state law promissory estoppel claim was not sufficiently connected with or related to ERISA plan to justify preemption, noting that "[a]n action brought by a health care provider to recover a promised payment from an insurance carrier is distinct from an action brought by a plan participant against the insurer seeking recovery of benefits due under the terms of the insurance plan"); *In Home Health, Inc. v. The Prudential Ins. Co.*, 101 F.3d 600, 604-05, 607 (8th Cir. 1997) (remanding health care provider's removed negligent misrepresentation claim against administrator of employee benefit plan for lack of ERISA preemption; provider was suing for damages on claims that were non-derivative and independent of any claims for plan benefits).[6]

---

[6] Numerous district courts have reached this same result based upon similar facts. *See, e.g., Johns Hopkins Hosp. v. Carefirst of Maryland, Inc.*, 327 F. Supp.2d 577, 579-81 (D. Md. 2004); *Children's Hosp. Corp. v. Kindercare Learning Ctrs., Inc.*, 360 F.Supp.2d 202, 204-07 (D. Mass. 2005); *Baylor Univ. Med. Ctr. v. Arkansas Blue Cross Blue Shield*, 331 F.Supp.2d 502, 505-10 (N.D. Tex. 2004); *Orthopaedic Surgery Assocs. of San Antonio, P.A. v. Prudential Health Care Plan, Inc.*, 147 F.Supp.2d 595, 597-603 (W.D. Tex. 2001).

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KEITH R. MCMURDY
Counsel of Record
KEITH J. ROSENBLATT
GROTTA, GLASSMAN & HOFFMAN, P.C.
75 Livingston Avenue
Roseland, New Jersey 07068
(973) 992-4800

Attorneys for Respondent

Supreme Court, U.S.
FILED
JUL 14 2005
OFFICE OF THE CLERK

(3)
No. 04-1452

IN THE

Supreme Court of the United States

LOCAL 464A UFCW WELFARE REIMBURSEMENT PLAN,
Petitioner,

v.

PASCACK VALLEY HOSPITAL, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

GEORGE R. MURPHY
MICHAEL T. ANDERSON *
ARLUS J. STEPHENS
DAVIS, COWELL & BOWE LLP
1701 K Street, NW
Suite 210
Washington, DC 20006
(202) 223-2620

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 04-1452

LOCAL 464A UFCW WELFARE REIMBURSEMENT PLAN,
Petitioner,

v.

PASCACK VALLEY HOSPITAL, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

Respondent Pascack Valley Hospital makes two arguments in defense of the Third Circuit's remand. First, it argues that, under the "well-pleaded complaint" rule, its decision to file its common-law action in state court determines the state-law character of its claim. This argument was rejected last month in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. ___, 125 S.Ct. 2363 (2005).

Second, the Hospital attacks the Third Circuit's recognition of a federal common-law right of action under ERISA. It argues, contrary to the Third Circuit, that there is no longer such a federal common-law right at all. This is an interesting issue, but the Court need not address it in the absence of a

cross-petition for certiorari. The question presented here concerns removal principles under 28 U.S.C. §1331, not the merits of the underlying ERISA case. To permit a clear resolution of the question presented, this Court may assume the correctness of the Third Circuit's view of ERISA common law without deciding it.

1. *Grable & Sons Metal Products* rejected the formalistic version of the "well-pleaded complaint" rule the Hospital urges here.

The Hospital argues that "the plaintiff's choice of a state court forum should not be disturbed if he chooses to proceed solely under state law," *citing Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 (1986). This argument echoes Justice Holmes' dissent in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 214 (1921).

The Court rejected this reading of *Merrell Dow* last month in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. ___, 125 S.Ct. 2363 (2005). Under *Grable*, the fact that the plaintiff has presented a federal claim "in state-law raiment" does not preclude removal. 125 S.Ct. at 2368. The federal courts have authority to decide for themselves the federal character of a claim, even over the plaintiff's objection. 125 S.Ct. at 2368-70.[1] After *Grable*, courts may assess removal simply by balancing the federal interest in adjudicating the case against the structural consequences of removal for the allocation of work between state and federal courts. *Grable*, 125 S.Ct. at 2371.

---

[1] *Grable* also defeats the Hospital's attempt to confine removal to the "complete preemption" exception. The federal tax laws at issue in *Grable* are not within any recognized "complete preemption" exception. As we explain in our Petition, p.5 n.1, the petition seeks certiorari for the Third Circuit's rejection of "arising under" jurisdiction, not its discussion of complete preemption later in its opinion.

This case permits the Court to develop its reasoning in *Grable* further. At a minimum, this Court should vacate and remand the case to the Third Circuit for further consideration in light of *Grable*.

2. The Court need not decide the merits of whether ERISA provides a federal common-law right of action.

The Hospital's only other defense of the Third Circuit's remand is to attack the Third Circuit's underlying recognition of a federal common law under ERISA. Even though the Third Circuit reaffirmed its recognition of an ERISA common law governing employee benefit plans, Pet.App. 12a-13a, the Hospital now argues that Third Circuit law is obsolete in light of *Great-West Life Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

This is the only basis on which the Hospital distinguishes the conflicting Circuit cases we cite in the Petition at 13-15. The Hospital simply argues on the merits that in all the other cases, there was a genuine federal source of law for the removed state-court claims, whereas here (contrary to the Third Circuit's pre-*Knudson* decisions) there is not.

The Court need not decide this issue. The Hospital has not filed a cross-petition for certiorari over the Third Circuit's continued recognition of a federal common-law right under ERISA. Unlike issues of standing that bear on Article III jurisdiction, the question whether ERISA creates a statutory right of action is a matter of statutory interpretation, which the Court may assume without deciding. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998).

For present purposes, the Court may assume without deciding that the Third Circuit's construction of ERISA is correct, and decide the removal question presented on that basis. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994) ("The question whether a federal statute creates a

claim for relief is not jurisdictional. [cit.om.] Accordingly, we shall assume, solely for purposes of this case, that the alleged AHTA private right of action exists."); *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) *citing Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) ("Whether a cause of action exists is not a question of jurisdiction, and may be assumed without being decided.").

Once the Court corrects the Third Circuit's error in removal jurisdiction, it may remand the statutory issue to the Third Circuit for further consideration.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

GEORGE R. MURPHY
MICHAEL T. ANDERSON *
ARLUS J. STEPHENS
DAVIS, COWELL & BOWE LLP
1701 K Street, NW
Suite 210
Washington, DC 20006
(202) 223-2620

* Counsel of Record

Counsel for Petitioner